PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

B6

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

File: EAC 01 171 51819 Office: Vermont Service Center Date: JUN 19 2003

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: [redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the request for labor certification was accepted for processing on December 26, 1997. The proffered salary as stated on the labor certification is $486.40 per week which equals $25,292.80 annually.

With the petition, counsel submitted a copy of the petitioner's 1997 and 1999 Form 1120S U.S. income tax returns for an S corporation. The 1997 tax return shows that the petitioner declared a loss of $3,099 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 1999 tax return shows that the petitioner declared a loss of $5,244 as its ordinary income that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on August 24, 2001, requested additional evidence pertinent to that ability. The Service Center also specifically requested that the petitioner provide either its 1998 federal tax return or its 1998 annual reports accompanied by audited or reviewed financial statements. Finally, the Service Center requested that, if the petitioner employed the beneficiary during 1998, it provide a copy of the Form W-2 wage and tax statement showing the amount it paid to the beneficiary.

In response, counsel submitted a letter, dated November 15, 2001, from the petitioner's owner. In that letter, the petitioner's owner stated that because the beneficiary had no social security number when he came to work for the petitioner, he was paid in cash. The owner implies that the payment was off the books and that no records of those payments were kept. The petitioner's owner further stated that at the time the letter was written, the beneficiary was earning $550 per week. Finally, the petitioner's owner provided copies of the petitioner's checking account statements, which the owner says show positive cash flow for the petitioner.

Counsel also submitted a letter, dated November 15, 2001, from an accountant. The accountant stated that he had reviewed the petitioner's financial statements since 1997 and determined that the petitioner had the ability to pay the proffered wage of $486.40 and still operate at a profit.

No financial statements or balance sheets were included with that letter. The accountant's letter is not among the types of competent evidence enumerated in 8 C.F.R. § 204.5(g)(2).

Finally, counsel provided copies of the petitioner's 1998 and 2000 Form 1120S U.S. income tax returns for an S corporation. The 1998

tax return shows that the petitioner declared an ordinary income of $1,558 for that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities were greater than it's current assets.

The 2000 tax returns shows that the petitioner declared an ordinary income of $8,560 for that year. The corresponding Schedule L shows that at the end of that year the petitioner had $20,138 in current assets and $19,245 in current liabilities, which yields net current assets of $893.

On April 16, 2002, the Director, Vermont Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage. The director noted that the petitioner's tax returns did not demonstrate that it was able to pay the proffered wage during 1997, 1998, 1999, or 2000, and that bank statements are not evidence competent to demonstrate the ability to pay the proffered wage.

On appeal, counsel insists that the petitioner's bank account balances clearly show the ability to pay the proffered wage and that the decision of the director was therefore contrary to 8 C.F.R. § 204.5(g).

In fact, 8 C.F.R. § 204.5(g)(2) plainly states that the petitioner shall prove the ability to pay the proffered wage with either copies of annual reports, federal tax returns, or audited financial statements. The petitioner submitted no annual reports or audited financial statements. Therefore, the petitioner's tax returns were the only competent evidence in the record pertinent to the petitioner's ability to pay the proffered wage. Those returns did not demonstrate that the petitioner was able to pay. As such, the director's decision was not only permissible, it was obligatory.

Subsequently, counsel submitted a brief and additional evidence. In the brief, counsel argued that the petitioner's tax returns are a poor indicator of the petitioner's actual cash position, and urged that the amounts shown on the petitioner's bank statements demonstrate that it has been able to pay the proffered wage since the priority date. Counsel also submitted additional bank statements.

The requirements of 8 C.F.R. § 204.5(g)(2) are unchanged. The petitioner might have elected to submit copies of annual reports or audited financial statements to demonstrate its ability to pay the proffered wage, but chose not to provide them. Having elected to submit tax returns rather than annual reports or audited financial statements, the petitioner shall not now be heard to argue that

they are a poor indicator of its ability to pay the proffered wage.

An exception would be made in a case where a petitioner demonstrated that during the pendency of the petition it had paid the beneficiary a wage greater than or equal to the proffered wage. In this case, the petitioner's owner states that he has been paying the beneficiary an amount greater than the proffered wage, but does not provide evidence in support of that assertion. An unsupported statement is insufficient to sustain the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner's tax returns are the only competent evidence in the record pertinent to the petitioner's ability to pay the proffered wage, and they do not support that the petitioner was able to pay that wage during 1997, 1998, 1999, or 2000. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.